IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 12, 2008 Session

ABBY WELLS v. TENNESSEE HOMESAFE INSPECTIONS, LLC

Appeal from the Circuit Court for Davidson County
No. 07C2417 Amanda McClendon, Judge

No. M2008-00224-COA-R3-CV - Filed December 15, 2008

In homeowner's suit against home inspection company, the trial court denied the company's motion to compel arbitration. Because the arbitration clause was not signed or initialed by a representative of the company as required by statute, we affirm the trial court's decision.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the court, in which RICHARD H. DINKINS, J., joined. PATRICIA J. COTTRELL, P.J., M.S., not participating.

Christopher D. Cravens, Nashville, Tennessee, for the appellant, Tennessee Homesafe Inspections, LLC.

J. Michael Morgan, Nashville, Tennessee, for the appellee, Abby Wells.

OPINION

Abby Wells entered into a contract with Tennessee Homesafe Inspections, LLC ("THSI") to perform a home inspection for $295. The two-page contract states that "the inspector is liable only up to the cost of the inspection." The first page of the contract was signed by Ms. Wells and by the inspector, Mark Taylor. On the second page of the contract, at the bottom of the page, appears the following arbitration provision:

> **ADDENDUM TO INSPECTION AGREEMENT**
>
> _____Any dispute, controversy, interpretations or claim including claims for, but not limited to, breach of contract, any form of negligence, fraud or misrepresentation arising out of, from or related to, this contract or arising out of, from or related to the inspection or inspection report shall be submitted to final and binding arbitration under the Rules and Procedures of the Expedited Arbitration of Home Inspection Disputes of *Construction Arbitration Services, Inc.* The decision of the Arbitrator

> appointed thereunder shall be the final and binding judgment on [sic] the Award may be entered in any Court of competent jurisdiction.

Ms. Wells signed her name under this clause, and her realtor signed as a witness.

Ms. Wells subsequently bought the home for which THSI provided inspection services and allegedly discovered problems with the home that had not been identified by THSI.[1] She filed suit in general sessions court in March 2007 against THSI, Mr. Taylor, and Stephen Flickinger[2] for negligence, breach of contract, and misrepresentation. The two individual defendants were dismissed; Ms. Wells obtained a judgment against THSI in the amount of $9,327.00 in August 2007.

THSI appealed to circuit court and filed a Motion to Stay Litigation and to Compel Arbitration or, in the Alternative, to Limit Defendant's Liability. A hearing on the defendant's motion was held on January 11, 2008, and the circuit court denied the motion. According to the statement of the proceedings, the circuit court found that "THSI and plaintiff did not bargain over the arbitration provision," that the arbitration provision was not conspicous, that THSI and the plaintiff "did not have the same risks" under the contract, and that the arbitration provision was unconscionable "in that it would cost $750 to initiate arbitration and there was a limitation of liability provision in said contract." THSI appeals the circuit court's decision to deny its motion to stay the litigation and to compel arbitration.

On appeal, THSI argues that the circuit court erred in denying its motion to compel arbitration because judicial and legislative policy strongly favor the enforcement of arbitration provisions and the arbitration provision at issue is not unconscionable.

STANDARD OF REVIEW

This court reviews the denial of a motion to compel arbitration under the same standards applicable to bench trials. *See Spann v. Am. Express Travel Related Servs. Co., Inc.*, 224 S.W.3d 698, 706 (Tenn. Ct. App. 2006). The trial court's findings of fact, if any, are reviewed "de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d). If the trial judge did not make specific findings of fact, we review the record to determine where the preponderance of the evidence lies. *Hardcastle v. Harris*, 170 S.W.3d 67, 78-79 (Tenn. Ct. App. 2004). Review of a question of law is also de novo, but with no presumption of correctness. *King v. Pope*, 91 S.W.3d 314, 318 (Tenn. 2002); *Rosenberg v. BlueCross BlueShield of Tenn., Inc.*, 219 S.W.3d 892, 903 (Tenn. Ct. App. 2006).

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[1]The sellers of the home had not resided in the home for more than three years prior to the sale and were, therefore, exempt from providing a Residential Property Condition Disclosure statement pursuant to Tenn. Code Ann. § 66-5-209(11).

[2]Mr. Flickinger's role is not evident from the record. Presumably, he was associated with THSI.

ANALYSIS

Tenn. Code Ann. § 29-5-302(a) provides as follows:

> A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable save upon such grounds as exist at law or in equity for the revocation of any contract; provided that for contracts relating to farm property, structures or goods, or *to property or structures utilized as a residence of a party, the clause providing for arbitration shall be additionally signed or initialed by the parties.*

(Emphasis added). In interpreting a statute, the court is to ascertain the intent of the legislature from the natural and ordinary meaning of the language used and in the context of the entire statute. *Cohen v. Cohen*, 937 S.W.2d. 823, 828 (Tenn. 1996). We are to give effect to every word and assume that the legislature deliberately chose to use these words. *Tenn. Manufactured Hous. Ass'n v. Metro. Gov't of Nashville & Davidson County*, 798 S.W.2d 254, 257 (Tenn. Ct. App. 1990); *see Tidwell v. Collins*, 522 S.W.2d 674, 676-77 (Tenn. 1975). The statute plainly states that, for contracts involving a party's residence, the arbitration clause must be "additionally signed or initialed by the parties." Tenn. Code Ann. § 29-5-302(a). As previously noted by this court, Tennessee has "imposed a heightened notice requirement for the enforcement of agreements to arbitrate contained in certain types of contracts." *Hubert v. Turnberry Homes, LLC*, No. M2005-00955-COA-R3-CV, 2006 WL 2843449, *4 (Tenn. Ct. App. Oct. 4, 2006). We have construed this provision "as requiring that in situations involving farm or residential property as described in the statute, arbitration clauses must be separately signed or initialed *in addition to being written*, thereby ensuring notice of the clause in these particularized cases." *T.R. Mills Contractors, Inc. v. WRH Enters*, 93 S.W.3d 861, 869 (Tenn. Ct. App. 2002). As to the contract at issue, therefore, the statute required the arbitration clause to be signed or initialed by both parties. THSI did not sign or initial the arbitration clause, thus the arbitration provision is not enforceable under Tenn. Code Ann. § 29-5-302(a).

THSI has submitted three cases in support of its position that it was not necessary for THSI to separately sign or initial the arbitration clause in this case. We find all three cases distinguishable from the present case. *Merrimack Mut. Fire Ins. Co. v. Batts*, 59 S.W.3d 142, 149 (Tenn. Ct. App. 2001), presented the issue of whether an appraisal clause in an insurance policy constituted an arbitration agreement. One reason for the court's decision not to enforce the appraisal clause as an arbitration agreement was that the provision in question was not separately signed by the homeowner. *Merrimack*, 59 S.W.3d at 151. Applying Tenn. Code Ann. § 29-5-302(a), the court reasoned that "neither [the homeowner] nor Merrimack can require the other to submit to binding arbitration, if, indeed, that is what the appraisal clause . . . required." *Id.* Thus, although the court in *Merrimack* determined that the appraisal provision was not an arbitration agreement, the court's language supports our conclusion that the absence of one party's signature makes an arbitration agreement unenforceable by either party.

In *Hubert v. Turnberry Homes*, a case about a residential construction contract involving interstate commerce, the court determined that Section 2 of the Federal Arbitration Act preempted Tenn. Code Ann. § 29-5-302(a), part of the Tennessee Uniform Arbitration Act. *Hubert*, 2006 WL 2843449 at *3-6. Therefore, Tennessee's statutory requirement of a separate signing or initialing of the arbitration clause by both parties did not apply. *Id.* at *6. In this case, there is nothing in the record to suggest that the home inspection contract at issue involved interstate commerce. Moreover, counsel for THSI stated at oral argument that there was no dispute between the parties concerning the applicability of Tennessee law, and there is nothing in the record to suggest that the issue of the applicability of federal law was raised below. Thus, any preemption argument has been waived. *Cf. Guffy v. Toll Bros. Real Estate, Inc.*, No. M2003-01810-COA-R3-CV, 2004 WL 2412627, *5-7 (Tenn. Ct. App. Oct. 27, 2004) (case remanded for determination as to whether parties had agreed to be governed by the Federal Arbitration Act or the contract involved interstate commerce).

The third case cited by THSI, *Blair v. Brownson*, 197 S.W.3d 681, 684 (Tenn. 2006), is readily distinguishable because it involved the Statute of Frauds applicable to contracts for the sale of lands, Tenn. Code Ann. § 29-2-101(a)(4), which only requires the contract to be "signed by the party to be charged therewith." The present case does not involve a contract for the sale of land, and Tenn. Code Ann. § 29-5-302(a) expressly requires a separate signature or initialing by both parties.

We, therefore, conclude that the arbitration clause between Ms. Wells and THSI is unenforceable because it was not separately signed or initialed by both parties. Given this conclusion, we need not address any of the other issues raised.

CONCLUSION

We affirm the decision of the circuit court and remand to the trial court for further preceedings consistent with this opinion. Costs of appeal are assessed against the appellant, for which execution may issue if necessary.

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ANDY D. BENNETT, JUDGE